



Signed: November 21, 2007

EDWARD D. JELLEN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re Case No. 04-45847 EDJ
CLAY SCOTT BELL, Chapter 7
Debtor./

MEMORANDUM DECISION RE DEBTOR'S MOTION TO AVOID TRUSTEE'S LIEN

Lois I. Brady, trustee in bankruptcy (the "trustee"), holds a lien on certain proceeds she received when she sold a partnership interest that Clay Scott Bell, the above debtor ("Bell"), owned at the date of his bankruptcy petition. Bell has filed a motion seeking an order avoiding, and preserving for his own benefit, the trustee's lien.

Bell grounds his motion on Bankruptcy Code § 522(f)(1), by which a debtor can avoid certain liens that impair a debtor's claim of exemption.¹ Here, Bell has claimed a \$50,000 homestead exemption

¹Bankruptcy Code § 522(f)(1) provides, in relevant part:
"Notwithstanding any waiver of exemptions but subject to
(continued...)

Memorandum Decision

1 as to the partnership interest the trustee sold, and he claims that
2 the trustee's lien impairs that exemption. Alternatively, Bell asks
3 for an order requiring the trustee to deliver to him \$50,000 from
4 the proceeds of the sale of the partnership interest, representing
5 the amount of his homestead exemption.

6 The trustee opposes Bell's motion. The trustee also seeks an
7 order surcharging Bell's interest in the sales proceeds, should
8 Bell's motion be granted.

9 The court will deny Bell's motion, which renders the trustee's
10 motion moot.

11 A. Facts

12 The facts the court needs to decide Bell's motion are
13 undisputed. Prior to the filing of Bell's chapter 7 petition, Bell
14 owned a 15% interest in a partnership named "Dome." One of Dome's
15 assets was certain real property containing multiple units situated
16 in Oakland, California, County of Alameda (the "Property").
17 Although Bell had no ownership interest in the Property, or any of
18 the units comprising the Property, his partnership interest in Dome
19 entitled him to reside in one of the residential units at the
20 Property, pursuant to a grant of authority in the Dome partnership

21 ¹(...continued)
22 paragraph (3), the debtor may avoid the fixing of a lien on an
23 interest of the debtor in property to the extent that such lien
24 impairs an exemption to which the debtor would have been entitled
25 under subsection (b) of this section, if such lien is -
26 (A) a judicial lien . . . [subject to certain exceptions
not relevant here]."

1 agreement.

2 Approximately three months before the filing, one of Bell's
3 creditors, Bruce Beasley ("Beasley"), obtained a judgment against
4 Bell in the sum of \$493,181. Beasley then sought to enforce the
5 judgment by recording an abstract of judgment with the Alameda
6 County Recorder's Office. In addition, on September 27, 2004, less
7 than 90 days prior to the date of Bell's chapter 7 filing, Beasley
8 filed and served a motion for a charging order with the California
9 Superior Court pursuant to Cal. Civ. Proc. Code § 708.320.² Under
10 California law, the filing of such motion resulted in Beasley
11 obtaining a judgment lien on Bell's 15% interest in Dome. Id.

12 On October 27, 2004, Bell filed his voluntary chapter 7
13 petition herein. Thereafter, the trustee filed an adversary
14 proceeding against Beasley to avoid Beasley's judgment lien on Dome
15 as an avoidable preference under Bankruptcy Code § 547(b). On
16 August 3, 2007, this court entered judgment in favor of the trustee.
17 The judgment avoided Beasley's lien on Dome, and preserved the lien
18 for the benefit of Bell's bankruptcy estate pursuant to Bankruptcy
19 Code § 551.³

21 ²Cal. Civ. Proc. Code § 708(a) provides, in relevant part:
22 "A lien on a judgment debtor's interest in a partnership . . . is
23 created by service of a notice of motion for a charging order on
the judgement debtor and on [additional parties]."

24 ³Bankruptcy Code § 551 provides, in relevant part: "Any
25 transfer avoided under section . . . 547 . . . is preserved for
26 the benefit of the estate but only with respect to property of
the estate."

1 Thereafter, the trustee sold Bell's interest in Dome for
2 \$381,000 pursuant to an Order Authorizing Trustee to Sell Bankruptcy
3 Estate's Right Title and Interest in Partnership (Dome) entered
4 August 15, 2007. The order provided that the Beasley lien, as
5 preserved for the benefit of the estate, was transferred to the
6 sales proceeds.

7 The current dispute between the trustee and Bell arises out of
8 Bell's attempt to claim a homestead exemption as to his interest in
9 Dome. Bell's Schedule C (Property Claimed as Exempt) filed as part
10 of his chapter 7 case claims as exempt \$50,000 of value in

11 Debtor's residence held in the form of a 15% interest in
12 Dome. Dome owns the [Property]. The [Property] is worth
13 approximately \$1,000,000. Debtor believes that his
14 interest is less than 15% of the value of the building.
15 The partnership claims a \$120,000 charge against the
16 debtor's interest because the partnership has operated in
17 the red for 20 of the last 25 years.

18 Bell claimed the exemption pursuant to Cal. Civ. Proc. Code
19 § 704.730(a)(1), California's "automatic" homestead exemption
20 (sometimes referred to as an "Article 4" homestead exemption). Bell
21 contends that he resided at the Property at the date of the
22 petition, that the Property was his principal dwelling, and that the
23 fact that the Property was owned by Dome rather than Bell is
24 irrelevant to his right to claim an exemption as to the proceeds
25 from the trustee's sale of Dome.

26 The trustee disputes that Bell resided at the Property at the
27 date of the petition and contends that even if Bell did, he may not
28 claim a homestead exemption as to his interest in Dome or any
29 portion of the Property.

1 B. Discussion

2 For present purposes, the trustee concedes that if Bell is
3 entitled to claim a homestead exemption as to Dome, then Bell would
4 be entitled to avoid the trustee's lien interest in the proceeds
5 from the sale of Dome up to the sum of \$50,000, the amount of the
6 exemption claim at issue. See In re Heintz, 198 B.R. 581 (9th Cir.
7 BAP 1996) (holding that if a trustee avoids and preserves a lien on
8 exempt property, the debtor may seek to avoid the trustee's lien and
9 preserve it for the debtor's own benefit if the trustee's lien
10 impairs the debtor's exemption). The trustee also concedes that
11 such lien avoidance, in turn, would entitle Bell to the payment of
12 \$50,000 out of the proceeds.

13 Thus, the key issue is whether Bell may claim a homestead
14 exemption under California law in Dome, a partnership interest,
15 because of the fact that Dome owned the residence where Bell lived.
16 The court concludes in the negative.

17 The parties agree that the issue is governed by California law.
18 See Bankruptcy Code § 522(b)(2) (authorizing the States to "opt out"
19 of the exemptions specified in the Bankruptcy Code) and Cal. Civ.
20 Proc. Code § 703.130 (whereby California opts out of the Bankruptcy
21 Code exemptions). California Civ. Proc. Code § 703.020(a) provides:
22 "The exemptions provided by this chapter apply only to the property
23 of a natural person."⁴ Dome is not a natural person. Thus, Bell

24
25 ⁴"This chapter" within the meaning of Cal. Civ. Proc. Code
26 § 703.020 encompasses both California's Article 4 "automatic"
(continued...)

1 may not claim any property of Dome, including any interest in the
2 Property, as exempt. Nor does any provision of California law
3 entitle Bell to claim his partnership interest in Dome as exempt.

4 Moreover, for purposes of California's Article 4 homestead
5 exemption, "homestead" is defined as the debtor's "principal
6 dwelling." Cal. Civ. Proc. Code § 704.710(c). "Dwelling," in turn,
7 is defined as the "place where a person resides." Cal. Civ. Proc.
8 Code § 704.710(a). Dome, however, is not a "dwelling," and thus,
9 cannot be an Article 4 homestead.

10 The plain language of Cal. Civ. Proc. Code §§ 703.020(a) and
11 704.710(a) and (c), coupled with the fact that Bell cannot claim his
12 interest in Dome as exempt, would conclusively resolve the pending
13 motions, but for the decision of the California Court of Appeal in
14 Fisch, Spiegler, Ginsburg & Ladner v. Appel, 10 Cal. App. 4th 1810,
15 13 Cal. Rptr. 2d 471 (1992). In Appel, the court held that the
16 debtors therein could claim an exemption in their residence,
17 notwithstanding the fact that title to the residence was in a
18 revocable trust under which the right to revoke was held by the
19 debtors.

20 Appel, however, is distinguishable. The court's decision was
21 grounded on the facts that the trust was revocable and that the
22 power of revocation was held by the debtors. The court reasoned
23 that the debtors' right to revoke the trust gave them a contingent

24
25 ⁴(...continued)
26 homestead exemption, and California's Article 5 "declared"
homestead.

1 reversionary interest in the residence at issue, and that the
2 contingent reversionary interest was an interest in real property
3 that was eligible for a debtor to claim as exempt pursuant to
4 California's Article 5 declared homestead provisions. Appel, 10
5 Cal. App. 4th at 1813, 13 Cal. Rptr. 2d at 473. The court also
6 noted that the debtors claimed a life estate interest in their
7 residence and that the creditor opposing the exemption did not
8 dispute this fact. Id.

9 Here, Bell has no interest in the Property, or any portion
10 thereof, and no right to acquire title to any interest in the
11 Property by means of a right of revocation.

12 The court also notes that Bell has furnished no case law in
13 which a court allowed a claim of homestead exemption as to a
14 residence owned by a partnership.

15 Although not binding, decisions of other states construing
16 their homestead laws are instructive, and support the proposition
17 that Bell may not claim a homestead exemption as to a partnership
18 interest or a residence owned by a partnership. See, In re Gorman,
19 82 B.R. 253, 256 (D. Vt. 1987) (holding that under Vermont law,
20 individual partners may not claim a homestead exemption in
21 partnership property); In re Brooks, 103 B.R. 123 (Bankr. S.D. Tex.
22 1988) (same, under Texas law); In re Hale, 2004 Bankr. LEXIS 2495
23 (Bankr. D. Idaho 2004) (same, under Idaho law); Buchman v. Canard,
24 926 So. 2d 390 (Fla. 3d Dist. Ct. App. 2005) (same, under Florida
25 law). But see Scoggins v. Taylor, 248 S.W. 2d 549 (Tex. App. 1952)
26 (suggesting that homestead rights may be available to a partner with

1 the consent of all the other partners).

2 C. Conclusion

3 For the reasons stated above, the court will issue its order
4 denying Bell's motions on the merits and denying the trustee's
5 motion as moot.

6 **END OF MEMORANDUM**

COURT SERVICE LIST

Scott E. Turner
Law Offices of Scott E. Turner
2000 Broadway
Redwood City, CA 94063

Michael J. McQuaid
Carr, McClellan, Ingersoll et al
216 Park Rd.
P.O. Box 513
Burlingame, CA 94011-0513

Office of the U.S. Trustee
1301 Clay Street, Suite 690N
Oakland, CA 94612-5217

Kaipo K.B. Young Esq.
Bartlett, Leader-Picone & Young, LLP
2201 Broadway, Suite 803
Oakland, CA 94612